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From:	Kevin J. Zilka		

Docket No.: NAIIP063_01.305.01 **App. No: 10/029,591**

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Practitioner's Docket No. NAI1P063/01.305.01 ***PATENT***

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Herbert V. Joiner et al.

Application No.: 10/029,591 Group No.: 3639
Filed: 12/21/2001 Examiner: Thomas A. Dixon
For: SYSTEM, METHOD AND COMPUTER PROGRAM PRODUCT FOR A NETWORK ANALYZER BUSINESS MODEL

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

TRANSMITTAL OF APPEAL BRIEF
(PATENT APPLICATION--37 C.F.R. § 41.37)

1. This brief is in furtherance of the Notice of Appeal filed 12/12/2005, a substitute for the Appeal Brief filed 03/16/2006, and in response to the Notification of Non-Compliant Appeal Brief mailed on 06/21/2006.

2. STATUS OF APPLICANT

This application is on behalf of other than a small entity.

CERTIFICATION UNDER 37 C.F.R. §§ 1.8(a) and 1.10*

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Date: 7/21/2006

April Skovmand
Signature

April Skovmand
(type or print name of person certifying)

** Only the date of filing (' 1.6) will be the date used in a patent term adjustment calculation, although the date on any certificate of mailing or transmission under ' 1.8 continues to be taken into account in determining timeliness. See ' 1.703(f). Consider "Express Mail Post Office to Addressee" (' 1.10) or facsimile transmission (' 1.6(d)) for the reply to be accorded the earliest possible filing date for patent term adjustment calculations.*

3. FEE FOR FILING APPEAL BRIEF

Pursuant to 37 C.F.R. §1.17(c), the fee for filing the Appeal Brief has already been paid. However, the Commissioner is authorized to charge any fees that may be due to deposit account 50-1351 (NAI1P063).

4. EXTENSION OF TERM

The proceedings herein are for a patent application and the provisions of 37 C.F.R. § 1.136 apply.

Applicant(s) believe that no Extension of Time is required; however, if it is determined that such an extension is required, Applicant(s) hereby petition that such an extension be granted and authorize the Commissioner to charge the required fees for an Extension of Time under 37 CFR 1.136 to Deposit Account No. 50-1351.

5. TOTAL FEE DUE

Applicant believes that only the above fees are due in connection with the filing of this paper because the appeal brief fee was paid with a previous submission. However, the Commissioner is authorized to charge any additional fees that may be due (e.g. for any reason including, but not limited to fee changes, etc.) to deposit account 50-1351 (Order No. NAI1P063).

6. FEE PAYMENT

If any additional extension and/or fee is required, and if any additional fee for claims is required, charge Deposit Account No. 50-1351 (Order No. NAI1P063).

A duplicate of this transmittal is attached.

Signature of Practitioner
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PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Herbert V. Joiner et al.

Application No.: 10/029,591 Group No.: 3639
Filed: 12/21/2001 Examiner: Thomas A. Dixon
For: SYSTEM, METHOD AND COMPUTER PROGRAM PRODUCT FOR A NETWORK ANALYZER BUSINESS MODEL

Mail Stop Appeal Briefs – Patents
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Alexandria, VA 22313-1450

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(PATENT APPLICATION--37 C.F.R. § 41.37)

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Signature

Date: 7/21/2006

April Skovmand

(type or print name of person certifying)

** Only the date of filing (' 1.6) will be the date used in a patent term adjustment calculation, although the date on any certificate of mailing or transmission under ' 1.8 continues to be taken into account in determining timeliness. See ' 1.703(f). Consider "Express Mail Post Office to Addressee" (' 1.10) or facsimile transmission (' 1.6(d)) for the reply to be accorded the earliest possible filing date for patent term adjustment calculations.*

3. FEE FOR FILING APPEAL BRIEF

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4. EXTENSION OF TERM

The proceedings herein are for a patent application and the provisions of 37 C.F.R. § 1.136 apply.

Applicant(s) believe that no Extension of Time is required; however, if it is determined that such an extension is required, Applicant(s) hereby petition that such an extension be granted and authorize the Commissioner to charge the required fees for an Extension of Time under 37 CFR 1.136 to Deposit Account No. 50-1351.

5. TOTAL FEE DUE

Applicant believes that only the above fees are due in connection with the filing of this paper because the appeal brief fee was paid with a previous submission. However, the Commissioner is authorized to charge any additional fees that may be due (e.g. for any reason including, but not limited to fee changes, etc.) to deposit account 50-1351 (Order No. NAI1P063).

6. FEE PAYMENT

If any additional extension and/or fee is required, and if any additional fee for claims is required, charge Deposit Account No. 50-1351 (Order No. NAI1P063).

A duplicate of this transmittal is attached.

Signature of Practitioner
Kevin J. Zilka
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Reg. No.: 41,429
Tel. No.: 408-971-2573
Customer No.: 28875

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:	
H. Joiner et al.	Group Art Unit: 3639
Application No. 10/029,591	Examiner: Thomas A. Dixon
Filed: 12/21/2001	Date: 07/21/2006
For: SYSTEM, METHOD AND COMPUTER PROGRAM PRODUCT FOR A NETWORK ANALYZER BUSINESS MODEL	

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

ATTENTION: Board of Patent Appeals and Interferences

SUBSTITUTE APPEAL BRIEF (37 C.F.R. § 41.37)

This brief is in furtherance of the Notice of Appeal filed 12/12/2005, a substitute for the Appeal Brief filed 03/16/2006, and in response to the Notification of Non-Compliant Appeal Brief mailed on 06/21/2006 (see attached). While appellant disagrees with the Examiner as to whether the alleged deficiencies exist in the original Appeal Brief, a Substitute Appeal Brief with appropriate edits is nevertheless submitted to expedite prosecution.

The fees required under § 1.17, and any required petition for extension of time for filing this brief and fees therefor, are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

This brief contains these items under the following headings, and in the order set forth below (37 C.F.R. § 41.37(c)(i)):

I REAL PARTY IN INTEREST
II RELATED APPEALS AND INTERFERENCES
III STATUS OF CLAIMS

IV STATUS OF AMENDMENTS

V SUMMARY OF CLAIMED SUBJECT MATTER

VI GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

VII ARGUMENT

VIII CLAIMS APPENDIX

IX EVIDENCE APPENDIX

X RELATED PROCEEDING APPENDIX

The final page of this brief bears the practitioner's signature.

I REAL PARTY IN INTEREST (37 C.F.R. § 41.37(c)(1)(i))

The real party in interest in this appeal is McAfee, Inc.

II RELATED APPEALS AND INTERFERENCES (37 C.F.R. § 41.37(c) (1)(ii))

With respect to other prior or pending appeals, interferences, or related judicial proceedings that will directly affect, or be directly affected by, or have a bearing on the Board's decision in the pending appeal, there are no other such appeals, interferences, or related judicial proceedings.

A Related Proceedings Appendix is appended hereto.

III STATUS OF CLAIMS (37 C.F.R. § 41.37(c) (1)(iii))

A. TOTAL NUMBER OF CLAIMS IN APPLICATION

Claims in the application are: 1-34

B. STATUS OF ALL THE CLAIMS IN APPLICATION

1. Claims withdrawn from consideration: None
2. Claims pending: 1-34
3. Claims allowed: None
4. Claims rejected: 1-34
5. Claims cancelled: None

C. CLAIMS ON APPEAL

The claims on appeal are: 1-34

See additional status information in the Appendix of Claims.

IV STATUS OF AMENDMENTS (37 C.F.R. § 41.37(c)(1)(iv))

As to the status of any amendment filed subsequent to final rejection, there are no such amendments after final.

V SUMMARY OF CLAIMED SUBJECT MATTER (37 C.F.R. § 41.37(c)(1)(v))

With respect to a summary of Claims 1, 9 and 17, as shown in Figure 28, a system, method and computer program product are provided for charging for network analysis, and executing on a computer including a computer readable medium. In use, network traffic information is collected utilizing a plurality of agents (e.g. item 2802 of Figure 28). The network traffic information is then consolidated utilizing a plurality of host controllers coupled to the agents (e.g. item 2804 of Figure 28). In addition, the network traffic information is reported to a user utilizing a plurality of zone controllers coupled to the host controllers (e.g. item 2806 of Figure 28). Further, a reoccurring fee associated with the reporting is determined based on a number of at least one of the agents, the host controllers, and the zone controllers (e.g. item 2808 of Figure 28). See page 35, line 13-page 36, line 4, for example.

With respect to a summary of Claims 2, 10 and 18, the above summary of Claims 1, 9 and 17 is incorporated by reference, at least in part. The reoccurring fee associated with the reporting is determined based on the number of the agents (e.g. item 900 of Figure 9). See page 36, lines 9-16, for example.

With respect to a summary of Claims 3, 11 and 19, the above summary of Claims 1, 9 and 17 is incorporated by reference, at least in part. The reoccurring fee associated with the reporting is determined based on the number of the host controllers (e.g. item 1002 of Figure 10). See page 36, lines 9-16, for example.

With respect to a summary of Claims 4, 12 and 20, the above summary of Claims 1, 9 and 17 is incorporated by reference, at least in part. The reoccurring fee associated with the reporting is determined based on the number of the zone controllers (e.g. item 1602 of Figure 16). See page 36, lines 9-16, for example.

With respect to a summary of Claims 5, 13 and 21, the above summary of Claims 1, 9 and 17 is incorporated by reference, at least in part. Additional agents coupled to the host controllers (e.g. item 1002 of Figure 10) are added. See page 36, lines 18-19, for example.

With respect to a summary of Claims 6, 14 and 22, the above summary of Claims 5, 13 and 21 is incorporated by reference, at least in part. The reoccurring fee is adjusted based on the number of additional agents (e.g. item 900 of Figure 9). See page 36, lines 9-24, for example.
With respect to a summary of Claim 25, the above summary is incorporated at least in part. As also shown in Figure 28, the user is charged for the recurring fee (e.g. item 2810 of Figure 28). See page 36, lines 14-16, for example.

With respect to a summary of Claims 26 and 28, as shown in Figure 28, a method and computer program product are provided for charging for distributed network analysis, and executing on a computer including a computer readable medium. In use, network traffic information is collected utilizing a plurality of information collectors (e.g. item 2802 of Figure 28). The network traffic information is then consolidated utilizing at least one information collector manager coupled to the information collectors. Additionally, the network traffic information is reported to a user utilizing at least one interface (e.g. item 2806 of Figure 28). Further, a fee associated with the distributed network analysis is determined based on a number of the information collectors (e.g. item 2808 of Figure 28). See page 35, line 13-page 36, line 4, for example.

With respect to a summary of Claim 30, the above summary of Claims 1, 9 and 17 is incorporated by reference, at least in part. The reoccurring fee is based on a tiered system. See page 36, lines 9-12, for example.

With respect to a summary of Claim 31, the above summary of Claim 30 is incorporated by reference, at least in part. The number of the at least one of the agents (e.g. item 900 of Figure 9), the host controllers (e.g. item 1002 of Figure 10), and the zone controllers (e.g. item 1602 of Figure 16) are set for each tier. See page 36, lines 10-11, for example.

With respect to a summary of Claim 32, the above summary of Claims 1, 9 and 17 is incorporated by reference, at least in part. The reoccurring fee is based on a non-linear function. See page 36, lines 11-12, for example.

With respect to a summary of Claim 33, the above summary of Claims 1, 9 and 17 is incorporated by reference, at least in part. The reoccurring fee is a monthly fee. See page 37, lines 15-18, for example.

With respect to a summary of Claim 34, the above summary of Claims 1, 9 and 17 is incorporated by reference, at least in part. Each agent (e.g. item 900 of Figure 9) incurs a first reoccurring fee, each host controller (e.g. item 1002 of Figure 10) incurs a second reoccurring fee greater than the first reoccurring fee, and each zone controller (e.g. item 1602 of Figure 16) incurs a third reoccurring fee greater than the second reoccurring fee. See page 36, lines 4-7, for example.

VI GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL (37 C.F.R. § 41.37(c)(1)(vi))

Following, under each issue listed, is a concise statement setting forth the corresponding ground of rejection.

Issue # 1: The Examiner has rejected Claims 1-8, 25 and 26 under 35 U.S.C. 101 as being directed toward non-statutory subject matter.

Issue # 2: The Examiner has rejected Claims 1-29 under 35 U.S.C. 103(a) as being unpatentable over Wolf et al. (U.S. Patent No. 6,278,694), in view of Turek et al. (U.S. Patent No. 6,021,439).

Issue # 3: The Examiner has rejected Claims 30-34 under 35 U.S.C. 103(a) as being unpatentable over Wolf et al. (U.S. Patent No. 6,278,694), in view of Turek et al. (U.S. Patent No. 6,021,439), in further view of Furukawa et al. (U.S. Patent No. 6,145,011).

VII ARGUMENT (37 C.F.R. § 41.37(c)(1)(vii))

The claims of the groups noted below do not stand or fall together. In the present section, appellant explains why the claims of each group are believed to be separately patentable.

Issue # 1:

The Examiner has rejected Claims 1-8, 25 and 26 under 35 U.S.C. 101 as being directed toward non-statutory subject matter.

Group #1: Claims 1-8, 25 and 26

Appellant respectfully disagrees with this rejection, since appellant specifically claims a "method for charging for network analysis, and executing on a computer including a computer readable medium" (emphasis added).

Issue # 2:

The Examiner has rejected Claims 1-29 under 35 U.S.C. 103(a) as being unpatentable over Wolf et al. (U.S. Patent No. 6,278,694), in view of Turek et al. (U.S. Patent No. 6,021,439).

Group #1: Claims 1, 7-9, 15-17 and 23-24

With respect to independent Claims 1, 9, and 17, the Examiner has relied on Col. 3, line 16-Col. 2, line 20 and Figure 1 in Wolf (appellant assumes the Examiner meant Col. 3, line 16-Col. 4, line 20) to make a prior art showing of appellant's claimed "consolidating the network traffic information utilizing a plurality of host controllers coupled to the agents" (see this or similar, but not identical language in each of the foregoing claims).

Appellant respectfully asserts that Wolf expressly discloses "remote probes P1-P3 [that] transmit their monitoring data to a network manager 20" (see Col. 3, lines 37-39). Clearly, transmitting monitoring data to a single network manager (Figure 1), as in Wolf, does not meet appellant's

specific claim language, namely that "the network traffic information [is consolidated] utilizing a plurality of host controllers coupled to the agents" (emphasis added).

In the latest Office Action dated 10/26/2005, the Examiner argued that Col. 8, lines 13-14 from Wolf disclose that the network manager produces a traffic report for the selected address pairs. The Examiner further argued that the network manager of Wolf contains a memory storage medium that stores three programs (Col. 5, lines 1-7) where the first program controls the polling and processing of polled monitoring data from the probes P1 and P2, while the second program does the same for probe P3. The Examiner has thus concluded that the network manager has a plurality of programs that handle network communications for each probe, thus handling different zones.

Appellant respectfully asserts that Wolf only teaches that the "program X controls polling and processing of polled monitoring data from probes P1 and P2...[and] program Y controls the polling and processing of polled monitoring data from the probe P3" (Col. 5, lines 3-7). Thus, each program only controls polling and processing. Simply nowhere does Wolf teach that the programs "consolidate[e] the network traffic information," as claimed by appellant(emphasis added).

Still with respect to independent Claims 1, 9, and 17, the Examiner has relied on Col. 3, line 16-Col. 2, line 20; Figure 1; Figure 7a; and Figure 8 in Wolf to make a prior art showing of appellant's claimed "reporting on the network traffic information to a user utilizing a plurality of zone controllers coupled to the host controllers" (see this or similar, but not identical language in each of the foregoing claims).

Appellant respectfully asserts that the descriptions in Wolf of Figures 7A and 8, as relied on by the Examiner, clearly teach that "the network manager 20 produces a traffic report for the selected address pairs" (see Col. 8, lines 13-14-emphasis added). Appellant asserts that a network manager that reports does not meet appellant's claimed "reporting...utilizing a plurality of zone controllers" (emphasis added). Thus, it appears that the Examiner has relied on the network manager in Wolf to meet both of appellant's claimed consolidating and reporting.

However, appellant claims utilizing a plurality of host controllers for consolidating and utilizing a plurality of zone controllers for reporting (two separate entities, as claimed).

In the latest Office Action dated 10/26/2005, the Examiner gave the same arguments as those stated above to meet appellant's specific claim language. Appellant again asserts that Wolf only teaches that the "program X controls polling and processing of polled monitoring data from probes P1 and P2...[and] program Y controls the polling and processing of polled monitoring data from the probe P3" (Col. 5, lines 3-7). Thus, each program only controls polling and processing. Simply nowhere does Wolf teach that the programs "[report] on the network traffic information to a user," as claimed by appellant(emphasis added).

Also with respect to independent Claims 1, 9, and 17, the Examiner has relied on the following excerpt from Turek to make a prior art showing of appellant's claimed "determining a reoccurring fee associated with the reporting based on a number of at least one of the agents, the host controllers, and the zone controllers" (see this or similar, but not identical language in each of the foregoing claims).

"In the management server implementation shown in FIG. 7, the server manages the quality-of-service information on behalf of one or more instrumented Web servers, perhaps for a service fee. Alternatively, the management server is used to collect the Q-o-S information on behalf of a set of instrumented Web servers, and a central controller located elsewhere in the network provides analysis (and, if desired, distribution and/or publication, e.g., for a fee) of such data." (Col. 8, lines 38-45)

Appellant respectfully asserts that the above excerpt from Turek relied on by the Examiner merely teaches managing quality-of-service, distribution and/or publication for a service fee. However, generally mentioning a service fee does not even suggest "determining a reoccurring fee" (emphasis added), and especially not where the fee is "associated with the reporting based on a number of at least one of the agents, the host controllers, and the zone controllers," as claimed by appellant. Again, appellant emphasizes that neither Wolf nor Turek teach the utilization of three different entities, namely agents, host controllers and zone controllers, let

alone the aforementioned reoccurring fee which is tailored for such a framework, as claimed by appellant.

In the latest Office Action dated 10/26/2005, the Examiner relied on Col. 8, lines 38-45 in stating that Turek discloses that "the distribution for a fee occurs on behalf of one or more instrumented Web servers, meaning that these fees reoccur since more than one Web server needs to be accommodated." In addition, the Examiner has argued that since "the Web server handles the communication in the network, the fee is therefore associated with the agents, the host controller and zone controllers."

Appellant respectfully asserts that such excerpt only teaches that "the server manages the quality-of-service information on behalf of one or more instrumented Web servers, perhaps for a service fee." Simply because a fee may be charged for managing information for multiple Web servers (associated with a particular company, for example) does not inherently mean that the fee is reoccurring, as the Examiner seems to contend. Furthermore, Turek discloses that the service fee is for managing the quality-of-service information on behalf of at least one Web server. Simply managing quality-of-service information does not inherently mean that the fee is also "associated with the reporting based on a number of at least one of the agents, the host controllers, and the zone controllers," as claimed by appellant. In addition, the Examiner contends that the fee is associated with the agents, the host controller and zone controllers. However, it appears that the Examiner has not taken into consideration the full weight of appellant's claims, since appellant claims that the reoccurring fee is "based on a number of at least one of the agents, the host controllers, and the zone controllers" (emphasis added).

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art and not based on appellant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed.Cir.1991).

Appellant respectfully asserts that at least the third element of the *prima facie* case of obviousness has not been met, since the prior art references, when combined, fail to teach or suggest all of the claim limitations, as noted above.

Group #2: Claims 2, 10 and 18

The Examiner has relied on his rejections in Claim 1 with respect to the Wolf reference, and specifically has relied on Figure 1 in Wolf to make a prior art showing of appellant's claimed "determining the reoccurring fee associated with the reporting based on the number of the agents." Appellant notes, however, that the proposed combination of Wolf and Turek simply does not disclose any sort of fee that is specifically based on the number of particular components claimed, for tailoring a reoccurring fee for the unique claimed framework. In particular, appellant emphasizes that Figure 1 in Wolf only shows a multi-segment network and a network manager, and after careful review of the description of Figure 1, appellant notes that simply nowhere is there even a suggestion of any sort of fee, let alone "determining the reoccurring fee associated with the reporting based on the number of the agents," as appellant claims (emphasis added).

Appellant again respectfully asserts that at least the third element of the *prima facie* case of obviousness has not been met, since the prior art references, when combined, fail to teach or suggest all of the claim limitations, as noted above.

Group #3: Claims 3, 11 and 19

The Examiner has relied on his rejections in Claim 1 with respect to the Wolf reference, and specifically has relied on Figure 1 in Wolf to make a prior art showing of appellant's claimed "determining the reoccurring fee associated with the reporting based on the number of the host controllers." Appellant notes, however, that the proposed combination of Wolf and Turek simply does not disclose any sort of fee that is specifically based on the number of particular components claimed, for tailoring a reoccurring fee for the unique claimed framework. In particular, appellant emphasizes that Figure 1 in Wolf only shows a multi-segment network and a

network manager, and after careful review of the description of Figure 1, appellant notes that simply nowhere is there even a suggestion of any sort of fee, let alone "determining the reoccurring fee associated with the reporting based on the number of the host controllers," as appellant claims (emphasis added).

Appellant again respectfully asserts that at least the third element of the *prima facie* case of obviousness has not been met, since the prior art references, when combined, fail to teach or suggest all of the claim limitations, as noted above.

Group #4: Claims 4, 12 and 20

The Examiner has relied on his rejections in Claim 1 with respect to the Wolf reference, and specifically has relied on Figure 1 in Wolf to make a prior art showing of appellant's claimed "determining the reoccurring fee associated with the reporting based on the number of the zone controllers." Appellant notes, however, that the proposed combination of Wolf and Turek simply does not disclose any sort of fee that is specifically based on the number of particular components claimed, for tailoring a reoccurring fee for the unique claimed framework. In particular, appellant emphasizes that Figure 1 in Wolf only shows a multi-segment network and a network manager, and after careful review of the description of Figure 1, appellant notes that simply nowhere is there even a suggestion of any sort of fee, let alone "determining the reoccurring fee associated with the reporting based on the number of the zone controllers," as appellant claims (emphasis added).

Appellant again respectfully asserts that at least the third element of the *prima facie* case of obviousness has not been met, since the prior art references, when combined, fail to teach or suggest all of the claim limitations, as noted above.

Group #5: Claims 5, 13 and 21

Appellant notes that the Examiner has failed to even address appellant's claimed "adding additional agents coupled to the host controllers." Appellant respectfully asserts that simply nowhere is there any disclosure of such specific claim language in either the Wolf or Turek

references. Further, appellant emphasizes the relevant arguments made above with respect to Issue #2. Group #1.

Appellant again respectfully asserts that at least the third element of the *prima facie* case of obviousness has not been met, since the prior art references, when combined, fail to teach or suggest all of the claim limitations, as noted above.

Group #6: Claims 6, 14 and 22

Appellant notes that the Examiner has failed to even address appellant's claimed "adjusting the reoccurring fee based on the number of additional agents." Appellant respectfully asserts that simply nowhere is there any disclosure of such specific claim language in either the Wolf or Turek references. Further, appellant emphasizes the arguments made above with respect to Issue #2, Group #1.

Appellant again respectfully asserts that at least the third element of the *prima facie* case of obviousness has not been met, since the prior art references, when combined, fail to teach or suggest all of the claim limitations, as noted above.

Group #7: Claim 25

With respect to independent Claim 25, the Examiner has relied on Col. 3, line 16-Col. 2, line 20 and Figure 1 in Wolf (appellant assumes the Examiner meant Col. 3, line 16-Col. 4, line 20) to make a prior art showing of appellant's claimed "consolidating the network traffic information utilizing a plurality of host controllers coupled to the agents."

Appellant respectfully asserts that Wolf expressly discloses "remote probes P1-P3 [that] transmit their monitoring data to a network manager 20" (see Col. 3, lines 37-39). Clearly, transmitting monitoring data to a single network manager (Figure 1), as in Wolf, does not meet appellant's specific claim language, namely that "the network traffic information [is consolidated] utilizing a plurality of host controllers coupled to the agents" (emphasis added).

In the latest Office Action dated 10/26/2005, the Examiner argued that Col. 8, lines 13-14 from Wolf disclose that the network manager produces a traffic report for the selected address pairs. The Examiner further argued that the network manager of Wolf contains a memory storage medium that stores three programs (Col. 5, lines 1-7) where the first program controls the polling and processing of polled monitoring data from the probes P1 and P2, while the second program does the same for probe P3. The Examiner has thus concluded that the network manager has a plurality of programs that handle network communications for each probe, thus handling different zones.

Appellant respectfully asserts that Wolf only teaches that the "program X controls polling and processing of polled monitoring data from probes P1 and P2...[and] program Y controls the polling and processing of polled monitoring data from the probe P3" (Col. 5, lines 3-7). Thus, each program only controls polling and processing. Simply nowhere does Wolf teach that the programs "consolidate[e] the network traffic information," as claimed by appellant (emphasis added).

Still with respect to independent Claim 25, the Examiner has relied on Col. 3, line 16-Col. 2, line 20; Figure 1; Figure 7a; and Figure 8 in Wolf to make a prior art showing of appellant's claimed "reporting on the network traffic information to a user utilizing a plurality of zone controllers coupled to the host controllers."

Appellant respectfully asserts that the descriptions in Wolf of Figures 7A and 8, as relied on by the Examiner, clearly teach that "the network manager 20 produces a traffic report for the selected address pairs" (see Col. 8, lines 13-14-emphasis added). Appellant asserts that a network manager that reports does not meet appellant's claimed "reporting...utilizing a plurality of zone controllers" (emphasis added). Thus, it appears that the Examiner has relied on the network manager in Wolf to meet both of appellant's claimed consolidating and reporting. However, appellant claims utilizing a plurality of host controllers for consolidating and utilizing a plurality of zone controllers for reporting (two separate entities, as claimed).

In the latest Office Action dated 10/26/2005, the Examiner gave the same arguments as those stated above to meet appellant's specific claim language. Appellant again asserts that Wolf only

teaches that the "program X controls polling and processing of polled monitoring data from probes P1 and P2...[and] program Y controls the polling and processing of polled monitoring data from the probe P3" (Col. 5, lines 3-7). Thus, each program only controls polling and processing. Simply nowhere does Wolf teach that the programs "[report] on the network traffic information to a user," as claimed by appellant(emphasis added).

Also with respect to independent Claim 25, the Examiner has relied on the following excerpt from Turek to make a prior art showing of appellant's claimed "determining a reoccurring fee associated with the reporting based on a number of the agents, the host controllers, and the zone controllers."

"In the management server implementation shown in FIG. 7, the server manages the quality-of-service information on behalf of one or more instrumented Web servers, perhaps for a service fee. Alternatively, the management server is used to collect the Q-o-S information on behalf of a set of instrumented Web servers, and a central controller located elsewhere in the network provides analysis (and, if desired, distribution and/or publication, e.g., for a fee) of such data." (Col. 8, lines 38-45)

Appellant respectfully asserts that the above excerpt from Turek relied on by the Examiner merely teaches managing quality-of-service, distribution and/or publication for a service fee. However, generally mentioning a service fee does not even suggest "determining a reoccurring fee" (emphasis added), and especially not where the fee is "associated with the reporting based on a number of the agents, the host controllers, and the zone controllers," as claimed by appellant. Again, appellant emphasizes that neither Wolf nor Turek teach the utilization of three different entities, namely agents, host controllers and zone controllers, let alone the aforementioned reoccurring fee which is tailored for such a framework, as claimed by appellant.

In the latest Office Action dated 10/26/2005, the Examiner relied on Col. 8, lines 38-45 in stating that Turek discloses that "the distribution for a fee occurs on behalf of one or more instrumented Web servers, meaning that these fees reoccur since more than one Web server needs to be accommodated." In addition, the Examiner has argued that since "the Web server handles the

communication in the network, the fee is therefore associated with the agents, the host controller and zone controllers."

Appellant respectfully asserts that such excerpt only teaches that "the server manages the quality-of-service information on behalf of one or more instrumented Web servers, perhaps for a service fee." Simply because a fee may be charged for managing information for multiple Web servers (associated with a particular company, for example) does not inherently mean that the fee is reoccurring, as the Examiner seems to contend. Furthermore, Turek discloses that the service fee is for managing the quality-of-service information on behalf of at least one Web server. Simply managing quality-of-service information does not inherently mean that the fee is also "associated with the reporting based on a number of the agents, the host controllers, and the zone controllers," as claimed by appellant. In addition, the Examiner contends that the fee is associated with the agents, the host controller and zone controllers. However, it appears that the Examiner has not taken into consideration the full weight of appellant's claims, since appellant claims that the reoccurring fee is "based on a number of the agents, the host controllers, and the zone controllers" (emphasis added).

Appellant again respectfully asserts that at least the third element of the *prima facie* case of obviousness has not been met, since the prior art references, when combined, fail to teach or suggest all of the claim limitations, as noted above.

Group #8: Claims 26-29

With respect to independent Claims 26 and 28, the Examiner has again relied on Col. 8, lines 38-45 in Turek (as excerpted above) to make a prior art showing of appellant's claimed "determining a fee associated with the distributed network analysis based on a number of the information collectors" (see this or similar, but not identical language in each of the foregoing claims). Yet again, appellant respectfully asserts that such excerpt merely teaches managing quality-of-service, distribution and/or publication for a service fee. However, generally mentioning a service fee does not even suggest "determining a fee" (emphasis added), and especially not where the fee is "associated with the distributed network analysis based on a number of the information collectors," as claimed by appellant.

In the latest Office Action dated 10/26/2005, the Examiner relied on the same arguments as stated above to meet appellant's specific claim language. Appellant again respectfully asserts that the Examiner contends that the fee is associated with the agents, the host controller and zone controllers. However, appellant claims that the reoccurring fee is "based on a number of the information collectors" (emphasis added), and not simply associated with the agents, the host controller and zone controllers, as the Examiner contends.

Appellant again respectfully asserts that at least the third element of the *prima facie* case of obviousness has not been met, since the prior art references, when combined, fail to teach or suggest all of the claim limitations, as noted above.

Issue # 3:

The Examiner has rejected Claims 30-34 under 35 U.S.C. 103(a) as being unpatentable over Wolf et al. (U.S. Patent No. 6,278,694), in view of Turek et al. (U.S. Patent No. 6,021,439), in further view of Furukawa et al. (U.S. Patent No. 6,145,011).

Group #1: Claim 30

The Examiner has relied on Col. 43, lines 13-15 in Furukawa to make a prior art showing of appellant's claimed technique "wherein the reoccurring fee is based on a tiered system." Appellant respectfully asserts that such excerpt only discloses that a "degree of priority is represented in numeric values, on an 8-tiered system." Appellant emphasizes that Furukawa's degree of priority relates to the order in which ICS network frames are sent. Clearly, such priority utilizing a tiered system does not meet any sort of reoccurring fee, let alone where "the reoccurring fee is based on a tiered system." as appellant specifically claims.

Appellant again respectfully asserts that at least the third element of the *prima facie* case of obviousness has not been met, since the prior art references, when combined, fail to teach or suggest all of the claim limitations, as noted above.

Group #2: Claim 31

The Examiner has again relied on Col. 43, lines 13-15 in Furukawa to make a prior art showing of appellant's claimed technique "wherein the number of the at least one of the agents, the host controllers, and the zone controllers are set for each tier." Appellant respectfully asserts that such excerpt only relates to a degree of priority that is based on a tiered system which is used for determining a priority in which ICS network frames are sent. Further, Furukawa teaches that the tier based priority system is implemented for "a single speed class." Thus, the tiered system is implemented within each class, and determines within each class the priority in which frames are sent. Clearly, such disclosure does not meet appellant's specific claim language, namely that "the number of the at least one of the agents, the host controllers, and the zone controllers are set for each tier."

Appellant again respectfully asserts that at least the third element of the *prima facie* case of obviousness has not been met, since the prior art references, when combined, fail to teach or suggest all of the claim limitations, as noted above.

Group #3: Claim 32

The Examiner has relied on Col. 21, line 65-Col. 22, line 2 in Furukawa, and specifically Furukawa's disclosed network charging system, to make a prior art showing of appellant's claimed technique "wherein the reoccurring fee is based on a non-linear function." Appellant respectfully asserts that such excerpt discloses that in the network charging system "the charging is performed by counting ICS user frames to be sent or received when a communication is made." Clearly, charging based on a number of user frames sent, as in Furukawa, does not meet appellant's claimed "non-linear function" (emphasis added).

Appellant again respectfully asserts that at least the third element of the *prima facie* case of obviousness has not been met, since the prior art references, when combined, fail to teach or suggest all of the claim limitations, as noted above.

Group #4: Claim 33

Appellant respectfully asserts that the subject matter of such claim is deemed novel in view of the arguments made hereinabove regarding Issue #2, Group #1.

Group #5: Claim 34

The Examiner has relied on Col. 43, lines 13-15 and Col. 21, line 65-Col. 22, line 2 in Furukawa to make a prior art showing of appellant's claimed technique "wherein each agent incurs a first reoccurring fee, each host controller incurs a second reoccurring fee greater than the first reoccurring fee, and each zone controller incurs a third reoccurring fee greater than the second reoccurring fee." Specifically, the Examiner has argued that in Furukawa "charges are made according [to an] amount of information transferred in the ICS user frame...[which means] the more information that is transferred by the user, the higher the charge each time the information is transferred."

First, appellant respectfully asserts that the tiered system in Furukawa is utilized for determining a priority of when network frames are sent (see Col. 43, lines 13-27). Thus, determining an order of when frames are sent does not affect the amount of information transferred, but only the order in which frames are transferred. Thus, it is simply inappropriate to combine such priority with charges made according to an amount of frames sent. Simply nowhere does Furukawa teach charging different fees for different classes of information collectors, and specifically not that "each agent incurs a first reoccurring fee, each host controller incurs a second reoccurring fee greater than the first reoccurring fee, and each zone controller incurs a third reoccurring fee greater than the second reoccurring fee," as claimed by appellant.

Appellant again respectfully asserts that at least the third element of the *prima facie* case of obviousness has not been met, since the prior art references, when combined, fail to teach or suggest all of the claim limitations, as noted above.

In view of the remarks set forth hereinabove, all of the independent claims are deemed allowable, along with any claims depending therefrom.

VIII CLAIMS APPENDIX (37 C.F.R. § 41.37(c)(1)(viii))

The text of the claims involved in the appeal (along with associated status information) is set forth below:

1. (Previously Presented) A method for charging for network analysis, and executing on a computer including a computer readable medium, comprising:

(a) collecting network traffic information utilizing a plurality of agents;

(b) consolidating the network traffic information utilizing a plurality of host controllers coupled to the agents;

(c) reporting on the network traffic information to a user utilizing a plurality of zone controllers coupled to the host controllers; and

(d) determining a reoccurring fee associated with the reporting based on a number of at least one of the agents, the host controllers, and the zone controllers.

2. (Original) The method as recited in claim 1, and further comprising determining the reoccurring fee associated with the reporting based on the number of the agents.

3. (Original) The method as recited in claim 1, and further comprising determining the reoccurring fee associated with the reporting based on the number of the host controllers.

4. (Original) The method as recited in claim 1, and further comprising determining the reoccurring fee associated with the reporting based on the number of the zone controllers.

5. (Original) The method as recited in claim 1, and further comprising adding additional agents coupled to the host controllers.

6. (Original) The method as recited in claim 5, and further comprising adjusting the reoccurring fee based on the number of additional agents.

7. (Original) The method as recited in claim 1, and further comprising charging the user the recurring fee.

8. (Original) The method as recited in claim 1, and further comprising charging the user the recurring fee utilizing a network.

9. (Previously Presented) A computer program product for charging for network analysis, and executing on a computer including a computer readable medium, comprising:

(a) computer code for collecting network traffic information utilizing a plurality of agents;

(b) computer code for consolidating the network traffic information utilizing a plurality of host controllers coupled to the agents;

(c) computer code for reporting on the network traffic information to a user utilizing a plurality of zone controllers coupled to the host controllers; and

(d) computer code for determining a reoccurring fee associated with the reporting based on a number of at least one of the agents, the host controllers, and the zone controllers.

10. (Original) The computer program product as recited in claim 9, and further comprising computer code for determining the reoccurring fee associated with the reporting based on the number of the agents.

11. (Original) The computer program product as recited in claim 9, and further comprising computer code for determining the reoccurring fee associated with the reporting based on the number of the host controllers.

12. (Original) The computer program product as recited in claim 9, and further comprising computer code for determining the reoccurring fee associated with the reporting based on the number of the zone controllers.

13. (Original) The computer program product as recited in claim 9, and further comprising computer code for adding additional agents coupled to the host controllers.

14. (Original) The computer program product as recited in claim 13, and further comprising computer code for adjusting the reoccurring fee based on the number of additional agents.

15. (Original) The computer program product as recited in claim 9, and further comprising computer code for charging the user the recurring fee.

16. (Original) The computer program product as recited in claim 9, and further comprising computer code for charging the user the recurring fee utilizing a network.

17. (Previously Presented) A system for charging for network analysis updates, and executing on a computer including computer readable medium, comprising:

(a) logic for collecting network traffic information utilizing a plurality of agents;

(b) logic for consolidating the network traffic information utilizing a plurality of host controllers coupled to the agents;

(c) logic for reporting on the network traffic information to a user utilizing a plurality of zone controllers coupled to the host controllers; and

(d) logic for determining a reoccurring fee associated with the reporting based on a number of at least one of the agents, the host controllers, and the zone controllers.

18. (Original) The system as recited in claim 17, and further comprising logic for determining the reoccurring fee associated with the reporting based on the number of the agents.

19. (Original) The system as recited in claim 17, and further comprising logic for determining the reoccurring fee associated with the reporting based on the number of the host controllers.

20. (Original) The system as recited in claim 17, and further comprising logic for determining the reoccurring fee associated with the reporting based on the number of the zone controllers.

21. (Original) The system as recited in claim 17, and further comprising logic for adding additional agents coupled to the host controllers.

22. (Original) The system as recited in claim 21, and further comprising logic for adjusting the reoccurring fee based on the number of additional agents.

23. (Original) The system as recited in claim 17, and further comprising logic for charging the user the recurring fee.

24. (Original) The system as recited in claim 17, and further comprising logic for charging the user the recurring fee utilizing a network.

25. (Previously Presented) A method for charging for network analysis, and executing on a computer including a computer readable medium, comprising:

(a) collecting network traffic information utilizing a plurality of agents;

(b) consolidating the network traffic information utilizing a plurality of host controllers coupled to the agents;

(c) reporting on the network traffic information to a user utilizing a plurality of zone controllers coupled to the host controllers;

(d) determining a reoccurring fee associated with the reporting based on a number of the agents, the host controllers, and the zone controllers; and

(e) charging the user the recurring fee.

26. (Previously Presented) A method for charging for distributed network analysis, and executing on a computer including a computer readable medium, comprising:

collecting network traffic information utilizing a plurality of information collectors;

consolidating the network traffic information utilizing at least one information collector manager coupled to the information collectors;

reporting on the network traffic information to a user utilizing at least one interface; and

determining a fee associated with the distributed network analysis based on a number of the information collectors.

27. (Original) The method as recited in claim 26, wherein the fee is reoccurring.

28. (Previously Presented) A computer program product for charging for distributed network analysis, and executing on a computer including a computer readable medium, comprising:

computer code for collecting network traffic information utilizing a plurality of information collectors;

computer code for consolidating the network traffic information utilizing at least one information collector manager coupled to the information collectors;

computer code for reporting on the network traffic information to a user utilizing at least one interface; and

computer code for determining a fee associated with the distributed network analysis based on a number of the information collectors.

29. (Original) The computer program product as recited in claim 28, wherein the fee is reoccurring.

30. (Previously Presented) The method as recited in claim 1, wherein the reoccurring fee is based on a tiered system.

31. (Previously Presented) The method as recited in claim 30, wherein the number of the at least one of the agents, the host controllers, and the zone controllers are set for each tier.

32. (Previously Presented) The method as recited in claim 1, wherein the reoccurring fee is based on a non-linear function.

33. (Previously Presented) The method as recited in claim 1, wherein the reoccurring fee is a monthly fee.

34. (Previously Presented) The method as recited in claim 1, wherein each agent incurs a first reoccurring fee, each host controller incurs a second reoccurring fee greater than the first reoccurring fee, and each zone controller incurs a third reoccurring fee greater than the second reoccurring fee.

IX EVIDENCE APPENDIX (37 C.F.R. § 41.37(c)(1)(ix))

There is no such evidence.

X RELATED PROCEEDING APPENDIX (37 C.F.R. § 41.37(c)(1)(x))

There is no such related proceeding.

In the event a telephone conversation would expedite the prosecution of this application, the Examiner may reach the undersigned at (408) 971-2573. For payment of any additional fees due in connection with the filing of this paper, the Commissioner is authorized to charge such fees to Deposit Account No. 50-1351 (Order No. NAI1P063/01.305.01).

Respectfully submitted,

By: _____ Date: 7/21/06

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Please find below and/or attached an Office communication concerning this application or proceeding.

Notification of Non-Compliant Appeal Brief (37 CFR 41.37)	Application No. 10/029,591	Applicant(s) JOINER ET AL.	
	Examiner Thomas A. Dixon	Art Unit 3639	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address--

The Appeal Brief filed on *16 March 2006* is defective for failure to comply with one or more provisions of 37 CFR 41.37.

To avoid dismissal of the appeal, applicant must file anamended brief or other appropriate correction (see MPEP 1205.03) within **ONE MONTH or THIRTY DAYS** from the mailing date of this Notification, whichever is longer. **EXTENSIONS OF THIS TIME PERIOD MAY BE GRANTED UNDER 37 CFR 1.136.**

1. ☐ The brief does not contain the items required under 37 CFR 41.37(c), or the items are not under the proper heading or in the proper order.

2. ☐ The brief does not contain a statement of the status of all claims, (e.g., rejected, allowed, withdrawn, objected to, canceled), or does not identify the appealed claims (37 CFR 41.37(c)(1)(iii)).

3. ☐ At least one amendment has been filed subsequent to the final rejection, and the brief does not contain a statement of the status of each such amendment (37 CFR 41.37(c)(1)(iv)).

4. ☒ (a) The brief does not contain a concise explanation of the subject matter defined in each of the independent claims involved in the appeal, referring to the specification by page and line number and to the drawings, if any, by reference characters; and/or (b) the brief fails to: (1) identify, for each independent claim involved in the appeal and for each dependent claim argued separately, every means plus function and step plus function under 35 U.S.C. 112, sixth paragraph, and/or (2) set forth the structure, material, or acts described in the specification as corresponding to each claimed function with reference to the specification by page and line number, and to the drawings, if any, by reference characters (37 CFR 41.37(c)(1)(v)).

5. ☐ The brief does not contain a concise statement of each ground of rejection presented for review (37 CFR 41.37(c)(1)(vi))

6. ☐ The brief does not present an argument under a separate heading for each ground of rejection on appeal (37 CFR 41.37(c)(1)(vii)).

7. ☐ The brief does not contain a correct copy of the appealed claims as an appendix thereto (37 CFR 41.37(c)(1)(viii)).

8. ☐ The brief does not contain copies of the evidence submitted under 37 CFR 1.130, 1.131, or 1.132 or of any other evidence entered by the examiner **and relied upon by appellant in the appeal**, along with a statement setting forth where in the record that evidence was entered by the examiner, as an appendix thereto (37 CFR 41.37(c)(1)(ix)).

9. ☐ The brief does not contain copies of the decisions rendered by a court or the Board in the proceeding identified in the Related Appeals and Interferences section of the brief as an appendix thereto (37 CFR 41.37(c)(1)(x)).

10. ☒ Other (including any explanation in support of the above items):

1. Summary section V does not contain a summary of the support for the dependent claims argued separately.

Thomas A. Dixon
Primary Examiner
Art Unit: 3639